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No. (1)

Supreme Court, U.S.
FILED
10-564 OCT 25 2010
IN THE OFFICE OF THE CLERK

Supreme Court of the United States

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife, a Nevada General Partnership; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Petitioners,

—v.—

CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in ruling that the State of Nevada can restrict truthful advertising about legal brothels by asserting its interest in opposing messages promoting the "commodification" of sex, despite this Court's cases holding that there is no "vice exception" to the First Amendment?

2. Whether *Central Hudson* applies to restrictions on disfavored political speech justified by a desire to suppress ideas rather than concerns related to regulating the market?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings are identified in the caption of the case. Only the Attorney General appealed the district court's ruling. Two other defendants were named in the original complaint but did not participate in the appellate proceedings. First, the Secretary of State was named as a defendant in the original complaint but was dismissed from the proceedings by the district court. Second, the District Attorney of Clark County was also a defendant below but did not appeal the district court's decision.

STATEMENT PURSUANT TO RULE 29.6

Coyote Publishing, Inc. is the only corporate party. Its shares are wholly owned by respondent Howard Copelan and his wife. There is no parent corporation or publicly held company owning more than 10% of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals (App. 22a-63a) is reported at 598 F.3d 592. The opinion of the court of appeals denying rehearing en banc (App. 64a-65a) is unreported. The decision of the district court (App. 1a-21a) is also unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 11, 2010. A petition for rehearing en banc was denied on July 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Nev. Rev. Stat. § 201.430. Unlawful advertising of prostitution; penalties

1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any

public highway; or

(b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to NRS 244.345, or conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

3. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

4. Any person, company, association or corporation violating the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment.

(b) For a second violation within a

3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

Nev. Rev. Stat. § 201.440. Unlawful to permit illegal advertising of houses of prostitution; penalties

1. In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute, it is unlawful for any person, company, association or corporation knowingly to allow any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise a house of prostitution in his or her place of business.

2. Any person, company, association or corporation that violates the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or

by both fine and imprisonment.

(b) For a second violation within a 3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

STATEMENT OF THE CASE

This case involves a challenge by Petitioners to content-based and viewpoint-based restrictions on truthful, non-misleading commercial speech concerning legal, licensed brothels in Nevada, as set forth in Nev. Rev. Stat. §§ 201.430 and 201.440. Petitioners are two newspapers and one legal brothel. Respondents are public officials charged with enforcement of the statutes in question.

Nevada permits the licensing of legal brothels within the state. *See* Nev. Rev. Stat. § 201.354(1) ("It is unlawful for any person to engage in prostitution or solicitation. . . except in a licensed house of prostitution."). Nev. Rev. Stat. § 244.345(8) prohibits the licensing of legal houses of prostitution in counties with populations exceeding 400,000. This includes Clark County, Nevada, where Las Vegas and petitioner Las Vegas CityLife are located and most of CityLife's distribution occurs, as well

as Washoe County, where Reno is located. Prostitution is also prohibited in Carson City and in certain Nevada counties where it is banned at county option.

On March 16, 2006, Petitioners brought a facial challenge to the constitutionality of Nev. Rev. Stat. §§ 201.430 and 201.440. On cross-motions for summary judgment, the district court held that the challenged statutes violate the First and Fourteenth Amendments and enjoined their enforcement. App. 18a-19a. Generally applying the four-part test for commercial speech set forth in *Central Hudson Gas & Elec. Co. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the district court ruled that respondents "failed to meet their burden of demonstrating that the provisions containing the prohibition of advertising for legal brothels on streets, highways and theaters throughout the State of Nevada is narrowly tailored to effectuate a substantial government interest." App. 14a.[1] In reaching this conclusion, the district court specifically rejected any reliance on a "vice exception" to *Central Hudson*, citing this Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). App. 14a.

The Ninth Circuit reversed. Although acknowledging this Court's precedent

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[1] The district court held that one provision of the challenged statutes – N.R.S. § 201.430(3) – "extends to more than commercial speech" and is therefore subject to strict scrutiny, which it also failed. App. 8a.

prohibiting a "vice exception" to the First Amendment, the court of appeals ruled that advertising for legal brothels is *sui generis,* and thus could be upheld, despite this Court's case law, based on the state's "substantial interest" in limiting the dissemination of a message that the court of appeals characterized as the "commodification" of sex. App. 44a. There are only two ways to understand this ruling: either it permits courts to resurrect the "vice exception" on a case-by-case basis, or it permits government to suppress speech because of disagreement with its message or viewpoint. On July 29, 2010, Petitioners' request for an en banc review was denied. App. 64a-65a.

REASONS FOR GRANTING THE PETITION

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), this Court upheld a restriction on commercial speech based on the theory that the "greater" power to ban gambling included the "lesser" power to ban advertising about it. That premise is no longer good law. On three separate occasions since *Posadas*, this Court has expressly rejected the so-called "vice exception" to otherwise applicable First Amendment rules. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (tobacco); *Greater New Orleans Broad. Ass'n, Inc. v. Reilly*, 527 U.S. 173, 195-96 (1999) (gaming); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511-512 (1996) (plurality opinion)

(alcohol).

The decision below effectively resurrects this discredited notion, arguing that the "vice exception" can be accepted or rejected on a case-by-case basis, depending on the "vice" at issue. Its ruling is therefore inconsistent with this Court's controlling law. While legalized prostitution may be unique to Nevada, this Court's rules governing commercial speech apply nationwide and their consistent application is a matter of national importance.

In addition, this case raises the fundamental question of whether the relaxed *Central Hudson* test or strict scrutiny is the appropriate standard for evaluating viewpoint-based restrictions on commercial speech that, as here, are purportedly justified by the desire to suppress disfavored ideas.

I. The Decision Below Rests On A "Vice Exception" To The First Amendment That This Court Has Repeatedly Rejected And An Attempt To Assess The Social Value Of Speech That This Court Has Recently Ruled Improper.

In three decisions over the past fifteen years, this Court has rejected the idea of a "vice exception" to the *Central Hudson* test for evaluating restrictions on commercial speech.[2]

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[2] *Central Hudson* created a four-part, intermediate level analysis for restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial

See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525; *Greater New Orleans Broad. Ass'n, Inc. v. Reilly*, 527 U.S. 173; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484.

As the Court explained in *44 Liquormart*:

> Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the "vice" label on selected lawful activities, or requiring the

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> speech to come within that provision, it must at least concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

> federal courts to establish a federal common law of vice. For these reasons, a "vice" label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity.

517 U.S. at 514 (citations omitted).

The Ninth Circuit acknowledged this general principle but then purported to carve an exception for lawful speech advertising lawful brothels. Describing that speech as *sui generis*, the Ninth Circuit concluded it "ought to be treated differently than other advertising bans on 'vice' activities." App. 35a. It did not invoke any "interest in preventing commercial harms," generally accepted as the basis for subjecting commercial speech to greater governmental regulation than noncommercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993). Instead, the Ninth Circuit justified the upholding of the statutes based on disapproval of the political message disseminated to the public and out of a desire to protect the public from the alleged general societal harms created by certain kinds of speech. App. 38a-48a.

In so holding, the Ninth Circuit made two fundamental errors. First, this Court's decisions after *Posadas* rejecting a "vice exception" were clear and unequivocal; they

did not incorporate a loophole and the Ninth Circuit was unable to cite any language from this Court supporting one (let alone any holding on point). The reason for that is both simple and fundamental. *Posadas'* embrace of the "vice exception" was based on the idea that restrictions on speech represented a "lesser" exercise of government authority than a total ban on activity regarded as socially unacceptable (assuming that activity is not independently protected by the Constitution). In later reversing course, this Court recognized that restrictions on truthful and non-misleading speech can never be regarded as "lesser" intrusions in our constitutional system. *See 44 Liquormart*, 417 U.S. at 510-512.

Second, the Ninth Circuit compounded its constitutional mistake in finding an exception where none exists by devaluing the speech at issue based on the message it conveys. Just last Term, however, this Court emphatically held in *United States v. Stevens*, 130 S.Ct. 1577 (2010), that the First Amendment does not permit the government to strip disfavored speech of its constitutional protection through ad hoc balancing. For this reason, the Court rejected the government's proposition that: "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs," *id.* at 1585, stating that:

> As a free-floating test for First Amendment coverage, that sentence

> is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id.

Stevens involved depictions of animal cruelty. But, in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *affirmed* 475 U.S. 1001 (1986), the Court confronted a restriction on speech that, as here, the government attempted to justify because of its alleged negative impact on women.

> Indianapolis justifies [its anti-pornography] ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view

> pornography is not an idea; pornography is the injury.

771 F.3d at 328. The Seventh Circuit held the Indianapolis ordinance unconstitutional, noting that "[t]he Constitution forbids the state to declare one perspective right and silence opponents," *id.* at 325, and this Court affirmed.

In language strikingly similar to the Seventh Circuit's in *Hudnut*, the Ninth Circuit in this case explained that "a central premise of the restrictions is that the advertising of prostitution is an integral aspect of, and exacerbates, the commodification of human sexuality on a society-wide basis." App. 39a. Here, as in *Hudnut*, however, that rationale is insufficient to justify the suppression of speech.

Nor can the Ninth Circuit's argument that legal brothels are *sui generis*, and therefore not subject to the "no vice exception" principle, circumvent the general rule. As Justice Thomas pointed out in *Lorillard*, the attempt to limit the impact of a decision upholding a "vice exception" by emphasizing the *sui generis* nature of the speech at issue has no principled stopping point. Concurring in this Court's invalidation of restrictions on tobacco advertising, Justice Thomas wrote:

> Underlying many of the arguments of respondents and their *amici* is the idea that tobacco is in some sense sui generis – that it is so special, so unlike any other object of regulation,

> that application of normal First Amendment principles should be suspended . . . . [I]t seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products.

533 U.S. at 586-87 (citations omitted). That observation applies with equal force here.

II. Whether *Central Hudson* Applies to Restrictions On Disfavored Political Speech Justified By a Desire to Suppress Ideas Rather Than Concerns Related To Regulating the Market Is An Important Question Of First Amendment Law That This Court Should Resolve.

The decision below erroneously applied the *Central Hudson* test and can be reversed on that ground alone. But this case also raises an even more basic question: whether *Central Hudson* is the appropriate test when, as here, the government's justification for suppressing speech is disagreement with the underlying message rather than any interests concerning the fairness of the commercial transaction at issue.

Central Hudson represents a form of intermediate scrutiny for commercial speech that departs from the strict scrutiny that normally applies to speech restrictions. In that sense, it is closely related to *United States*

v. O'Brien, 391 U.S. 367 (1968), which likewise applies intermediate scrutiny when speech and conduct are combined in a single expressive act. To ensure that the regulation of conduct does not become a pretext for the regulation of speech, however, this Court has carefully limited *O'Brien* to situations where the government's regulation is not aimed at the suppression of speech. *Id.* at 377.[3]

The Court has applied the same caveat when applying intermediate scrutiny in other speech contexts as well. *See, e.g., Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984)(time, place and manner restrictions must be justified "without reference to the content of the regulated speech"); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48 (1986)(same for regulations addressing "secondary effects" of speech).

As interpreted by the Ninth Circuit in

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[3] As this Court explained when addressing flag burning during a political rally:

> If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. *See O'Brien, supra,* at 377, 88 S.Ct. at 1679. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

Texas v. Johnson, 491 U.S. 397, 403 (1989).

this case, the *Central Hudson* test poses the same constitutional risk and requires the same constitutional safety net. By repeatedly stressing its objection to speech promoting the "commodification" of sex, the Ninth Circuit made clear that its decision upholding Nevada's statutory scheme was viewpoint-based at its core, and not designed to ensure a fair marketplace. According to the Ninth Circuit, it was not the commercial nature of the speech that justified its regulation but, rather, the political message that sex is a commodity that can be sold. *See* App. 56a ("Nevada seeks to limit the message that sex may be bought and sold.").

When the government restricts speech for political reasons, it is not entitled to receive the same latitude given to viewpoint-neutral restrictions on speech designed to protect consumers engaged in commercial transactions.

Just as "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues," *Bolger v. Young Drugs Pro. Corp.*, 463 U.S. 60, 68 (1983), government should not be permitted to restrict the dissemination of unpopular ideas, unrelated to the regulation of commerce, merely because they occur in a commercial advertisement.

The "commonsense differences" between commercial and noncommercial speech, *Virginia State Bd. of Pharmacy v. Virginia*

Citizens Consumers Council, Inc., 425 U.S. 748, 771 n.24 (1976), begin to vanish quickly when the focus of the state's concern is the political content of a speaker's message.

> The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications. On the other hand, the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context.

Discovery Network, 507 U.S. at 426 n. 21.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), the Court chose a particularly relevant example to illustrate that point when it noted that "a state may not prohibit only that commercial speech that depicts men in a demeaning fashion."

The statement in *R.A.V.* may have been dicta, but it is one that has been echoed in other decisions. For example, in *44 Liquormart*, Justices Stevens, Kennedy, and Ginsburg wrote:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional

> protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501.

The commercial speech doctrine was designed to allow the government room to regulate the commercial marketplace, even when speech was involved, without having to satisfy traditional strict scrutiny. It was not designed to allow the government to ban or ration information or ideas that it deems objectionable for social or political reasons, even when the speech occurs in a commercial context. This Court rejected such paternalism when it first held in *Virginia Pharmacy* that commercial speech is entitled to constitutional protection. 425 U.S. at 770 ("Th[e] alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.").

Even more to the point, in *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977), this Court invalidated a ban on

contraceptive advertising that the government justified as necessary to suppress a message that would "legitimize sexual activity" among youth. The Court rejected the argument that the expression of protected points of view in a noncommercial context can be banned simply because they are contained within commercial speech.

> Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression the core of First Amendment values.

Id. at 702 n.28. As these cases indicate, allowing the government to circumvent the vigorous protections afforded political speech – even when communicated in a commercial context – is improper and not consistent with broader First Amendment principles.

Both *Carey* and *Virginia Pharmacy* were decided prior to *Central Hudson*. Yet, there is nothing in *Central Hudson* suggesting that one of the goals of the four-part analysis for commercial speech restrictions was to enable government to more easily restrict

disfavored viewpoints on controversial socio-political issues through use of less stringent constitutional scrutiny.

Allowing *Central Hudson's* analysis to justify restrictions on content-based and viewpoint-based restrictions is problematic, and a critical question for this Court. Indeed, through the years, "several members of the Court have expressed doubt about the *Central Hudson* analysis and whether it should apply in particular cases." *Lorillard*, 533 U.S. at 554 (citations omitted).[4]

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[4] The Ninth Circuit noted that: "[s]everal justices criticized the *Central Hudson* in subsequent cases, and the Court as a whole has acknowledged that criticism. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002)." App. 30a n.6. Moreover, lower courts have expressed confusion about how to apply *Central Hudson's* intermediate scrutiny instead of the strict scrutiny set forth in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 388-389 (1992) when evaluating content-based and viewpoint-based commercial speech restrictions. *See, MD II Entm't, Inc. v. City of Dallas*, 28 F.3d 492, 493, 495 (5th Cir. 1994) (finding that restrictions did not meet the lesser standard, the Fifth Circuit nonetheless queried whether strict scrutiny should apply to content-based restrictions on commercial speech). Indeed, some courts just apply *both* tests. *See, e.g., Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and *R.A.V.* and striking a ban on advertising "Crazy Horse" beer to meet the goal of decreasing the market for the product among Native Americans as failing to meet either test); *Citizens United For Free Speech II v. Long Beach Township Bd. Of Comm'rs*, 802 F. Supp. 1223, 1226 (D. N.J. 1992) (noting that strict scrutiny must apply to content-based restrictions on commercial speech but finding that an

Notwithstanding those doubts, this Court has never decided whether *Central Hudson* applies to restrictions designed to suppress ideas rather than to ensure fairness in the marketplace. It is an important question of First Amendment law squarely presented by the decision below.

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ordinance restricting and distinguishing between "for sale" and "for rent" signs designed to preserve property value and promote the aesthetic character of a neighborhood failed both tests).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 25, 2010

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife, a Nevada General Partnership; STEVE SEBELIUS, Editor of Las Vegas CityLife;

Plaintiffs,

CV-06-329-JCM-PAL
PLAINTIFFS' ORDER FOR SUMMARY JUDGMENT

v.

DEAN HELLER, in his official capacity as Secretary of State of the State of Nevada; GEORGE CHANOS, in his official capacity as Attorney General of the State of Nevada; DAVID ROGER in his official capacity as District Attorney of Clark County, Nevada;

Defendants.

I. Introduction

On or about March 6, 2006, Plaintiffs filed their Amended Verified Complaint alleging that N.R.S.§§ 201.430 and 201.440 are unconstitutional on their face, and requesting that the Court enjoin these statutes' enforcement. These statutes prohibit all truthful and non-misleading advertising concerning legal, licensed brothels in those Nevada counties that do not have licensed brothels, as well as in all public theaters and on all public streets and highways throughout the State.

The parties filed cross-motions for summary judgment, a hearing for which was held on July 12, 2007. Allen Lichtenstein and Lee Rowland of the ACLU of Nevada appeared on behalf of Plaintiffs: Coyote Publishing, Inc. Owner

of the High Desert Advocate, a newspaper located in West Wendover, Nevada; Howard Copelan, its publisher and editor; DR Partners, dba Las Vegas CityLife, a weekly newspaper in distributed in Clark County and throughout Nevada; Steve Sebelius its editor; and Bobbi A. Davis dba the Shady Lady Ranch a licensed brothel in Nye County, Nevada.

Edward T. Reed appeared for Defendants the Attorney General and Secretary of State of the State of Nevada. Robert J. Gower appeared for Defendant the District Attorney of Clark County Nevada. The parties stipulated to drop the Secretary of State as a defendant.

Plaintiffs' Complaint lists causes of action under 18 U.S.C. § 1983 facially challenging Nevada Revised Statute (N.R.S.) §§ 201.430 and 201.440 as violative of the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 9 of the Nevada Constitution and seeking to enjoin the statutes' enforcement by Defendants. Plaintiffs moved for summary judgment on these issues. Defendants filed a cross-motion for summary judgment.

II. Standards for summary judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See, Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1339 (9th Cir. 1980); *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). The parties agreed that there are no material facts at issue, and that the constitutionally of the statutes at issue are matters of law that are appropriate for summary judgment adjudication.

III. Facts

N.R.S .§ 244.345 (8) prohibits the licensing of legal houses of prostitution in counties with population exceeding 400,000. This includes Clark County, Nevada, where Las Vegas CityLife is located, and most of its distribution occurs. Legal prostitution is also in other Nevada counties at county option. N.R.S. § 201.430 and N.R.S. § 201.440 restrict advertising of legal, licensed brothels.[1]

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[1] N.R.S. § 201.430 states the following:

1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of N.R.S.§ 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any public highway; or

(b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to N.R.S. § 244.345, or conduct which is unlawful pursuant to paragraph

(b) of subsection 1 of N.R.S. § 207.030, in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

3. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

4. Any person, company, association or corporation violating the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment.

(b) For a second violation within a 3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

N.R.S. § 201. 440 states the following:

1. In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute, it is unlawful for any person, company, association or corporation knowingly to allow any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of N.R.S. § 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone

In addition to banning advertisements regarding illegal prostitution, N.R.S. § 201.430 prohibits legal brothels from advertising "[i]n any public theater, on the public streets of any city or town, or any public highway," throughout the state. *See* N.R.S. § 201.430 (1). The statute also completely bans legal brothels from engaging in advertising in counties where prostitution is illegal. For the purposes of the section, N.R.S. § 201.430(3) also makes disseminating certain information about brothels – such as their location – "prima facie evidence of advertising:"

> "[i]nclusion in any display, handbill or publication of the address, location, or telephone number of a house of prostitution or of identification of a means of

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acting on behalf of any such person, to advertise a house of prostitution in his place of business.

2. Any person, company, association or corporation that violates the provisions of this section shall be punished:

(a) For the first violation within a 3-year period, by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both fine and imprisonment.

(b) For a second violation within a 3-year period, by imprisonment in the county jail for not less than 30 days nor more than 6 months, and by a fine of not less than $250 nor more than $1,000.

(c) For a third or subsequent violation within a 3-year period, by imprisonment in the county jail for 6 months and by a fine of not less than $250 nor more than $1,000.

> transportation to such a house, or of directions telling how to obtain such information, constitutes prima facie evidence of advertising for the purposes of this section."

N.R.S. § 201.440 prohibits any person or business owner from allowing any person associated with a brothel to promote its use through advertisement in his or her place of business. Both N.R.S. § 201.430 and N.R.S. § 201.440 provide for criminal penalties. *See* N.R.S. §§ 201.330(4); 201.440(2).

IV. Analysis

The statutes at issue are unconstitutional restrictions on free speech, insofar as they apply to legal, licensed brothels, as opposed to illegal prostitution. The provision establishing that providing certain information is "prima facie advertising" extends to more than commercial speech and is thus subject to strict scrutiny, a test it fails. The prohibitions on advertising legal brothels in certain public spaces and on advertising legal brothels in counties where prostitution is illegal are subject to the limitations on restrictions on commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). Substantial restrictions on nonmisleading commercial speech that proposes a lawful transaction must directly advance a governmental interest and may not be any more extensive than necessary. *Central Hudson Gas &*

Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980). Supreme Court jurisprudence mandates that non-misleading speech concerning lawful "vice" activities enjoy the same level of protection as other commercial speech. *See 44 Liquormart v. State of Rhode Island*, 517 U.S. 484, 513-514 (1996). The government bears the burden of showing that restrictions on truthful, non-misleading speech concerning lawful activities and products are related to protecting a substantial state interest. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). The government has not and cannot meet this burden.

A. Prima facie evidence

N.R.S. § 201.430(3) attempts to regulate *any* publication of certain information regarding licensed brothels, such as their location, and extends to more than commercial speech. Therefore, the provision is subject to strict scrutiny. In *American Academy of Pain Management v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004), the Court noted the definition of commercial speech as set forth by the United States Supreme Court:

> "Commercial speech represents 'expression related solely to the economic interests of the speaker and its audience,' *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561, (1980), and 'does no more than propose a commercial transaction.' *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425

> U.S. 748, 752 (1976); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554- 55, (2001) (applying the *Central Hudson* analysis to tobacco advertising regulations)."

The *American Academy* Court also noted a three-part test for identifying commercial speech, stating that:"speech could properly be characterized as commercial when (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for engaging in the speech." 353 F.3d 1106, citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Ass'n of Nat'l. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728 (9th Cir.1994).

The definition of "prima facie evidence" of advertising contained in N.R.S. § 201.430(3) reaches far more than commercial speech and instead, defines a content-based restriction on fully protected non-commercial expression. If speech is 'not purely commercial; -- that is, if it does more propose a commercial transaction – then it is entitled to full First Amendment protection." *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002). Regulations on fully protected speech are subject to strict scrutiny, and the burden is on the government to show that the regulation at issue is narrowly tailored to bring about a compelling governmental interest. *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788, 800 (1985). Moreover, under strict scrutiny,. the government

must choose the least restrictive means to further the articulated interest. *Sable Communications of California, Inc. v. Federal Comm'n*,492 U.S. 115, 126 (1989); *Playboy Entertainment Group, Inc.*, 529 U.S. at 813; *See also, Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

Here, Defendants have demonstrated none of the elements required to meet the government's burden under strict scrutiny. They have identified no interest that is compelling. Nor have they shown that the statutes are the least restrictive means to effectively protect those compelling interests. Therefore the provisions restricting information about legal brothels as set forth in N.R.S. § 201.430(3) violate the United States Constitution.

B. Ban on legal brothel advertising on streets, highways and in theaters

The complete ban on advertising in certain public spaces contained in N.R.S. § 201.430 unquestionably restricts commercial speech. For commercial speech restrictions to comport with constitutional standards a court must go through the four-part analysis as set forth in *Central Hudson*, 447 U.S. at 556.

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and not be misleading. Next we ask whether the

> asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

The statutes restricts non-misleading advertisements that propose lawful transactions because they ban any advertisements and information concerning legal brothels. Neither statute contains any statement regarding what government interest they are protecting. Defendants have set forth two governmental interests purportedly advanced by this restriction – protection of children and a desire to limit the use of legal brothels.

1. Protection of children

Defendants have not demonstrated that there is a substantial governmental interest in preventing children from seeing information or advertising for legal brothels. While legal prostitution is a service that is clearly limited to adults, the same can be said for other products and services, such as alcoholic beverages, gaming and even automobiles. Moreover, any material that is deemed "harmful to minors" as set forth in N.R.S. § 201.257, cannot be displayed where minors can view it.

In his concurrence in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001) (THOMAS, J., concurring in judgment), a case that addressed

the issue on restrictions on cigarette advertising, Justice Thomas noted that an approach limiting public advertising to only those products or services used by children would create absurd results.

> "It is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage. Presumably, the State could ban car advertisements in an effort to enforce its restrictions on underage driving. It could regulate advertisements urging people to vote, because children are not permitted to vote."

In fact, the Supreme Court has repeatedly stated that a concern for the protection of children cannot be used as justification for restrictions on information aimed at adults. As the Court noted in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (examining advertising for contraceptives), "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *See also*, *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-214 (1975)(city ordinance prohibiting the showing of films containing nudity by a drive-in theater); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (statute making it an offense to make available to general reading public a book having a potentially deleterious influence on youth); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)(provisions seeking to protect minors from harmful material on the Internet); *United States*

v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000)(provision requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours).

In *Lorillard*, 533 U.S. at 565-566, the Supreme Court invalidated a Massachusetts law that prohibited outdoor advertising of certain tobacco products within 1,000 feet of a school or playground. In doing so, the Court noted that the idea of protecting children from exposure to advertising of adult products, such as tobacco, could not sustain a law that prohibited that advertising to adults. 533 U.S. at 564.

> "The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. . . . As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication."

2. Limitation of legal prostitution

Defendants have also stated a purported state interest in limiting the market for legal

prostitution. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513-514 (1996)("liquor price advertising"), the Court invalidated any "vice exception" to the constitutional protection afforded truthful commercial speech about lawful activities. Defendants have argued that legal prostitution is different than other "vice" activities addressed in *44 Liquormart*. Defendants, however, have provided no legal authority to support this position and to contradict the language in *44 Liquormart*.

Because Defendants have failed to meet their burden of demonstrating that the provisions containing the prohibition of advertising of legal brothels on streets, highways and theaters throughout the State of Nevada is narrowly tailored to effectuate a substantial governmental interest, such ban fails to meet the constitutional standards set forth in *Central Hudson*.

C. Ban on advertising in counties where legal brothels are prohibited

N.R.S. § 201.430 bans brothels from advertising in counties where prostitution is illegal; N.R.S. § 201.440 bans anyone from publishing advertisements from brothels in counties where prostitution is illegal. In addition to the purported governmental interests stated above – protection of children and limiting the "vice" activity of legal prostitution, Defendants have offered two other justifications for this prohibition. The first is to limit the alleged promotion of illegal prostitution that will result

from the advertising of legal brothels in counties where such establishments are not located. The second is to protect county autonomy in this area.

1. Promotion of illegal prostitution

Defendants have posited that advertising of licensed brothels in counties that by statute or county option do not have legal prostitution will promote and increase illegal prostitution in those counties. While decreasing illegal prostitution is clearly a substantial governmental interest, Defendants have failed to demonstrate how the statutes in question here would help the bring about that interest. Defendants' suggestion is, at best, highly speculative. The opposite effect is at least as plausible if not more so. It is more likely that tourists who are unclear about what is legal and what is not will be better able to discern, through truthful advertising, which establishments are lawful. Defendants have failed to show that the ban on legal brothel advertising in counties without such brothels is justified based on a desire to limit illegal prostitution.

2. Protecting county option

Defendants, citing *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), argue that the ban on legal brothel advertising in counties without legal brothels serves the substantial governmental interest of protecting the interests of the citizens of each individual county. In *Edge*, the U.S. Supreme Court upheld a federal law that prohibited lottery advertising by radio stations located in states that did not

operate lotteries. There, the federal government's stated interest was "to accommodate non-lottery states' interest in discouraging public participation in lotteries, even as they\ accommodate the countervailing interests of lottery States." 509 U.S. at 433-434. *Edge Broadcasting* was decided prior to *44 Liquormart* and also prior to the decision in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999), which held that under the *44 Liquormart* precedent an FCC regulation restricting advertisements related to gambling, for reasons similar to those in *Edge*, could not meet the standards of the *Central Hudson* test.

It should also be noted that *Edge Broadcasting* involved federal regulations concerning broadcast advertising. Regulation of broadcasting can be more restrictive than for other media. In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997), the Supreme Court noted that several prior cases had recognized special justifications for regulation of the broadcast media "that are not applicable to other speakers," including "the history of extensive Government regulation of the broadcast medium," (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 399-400 (1969), "the scarcity of available frequencies at its inception," (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-638 (1994)), and broadcasting's "invasive" nature," (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989)). From a regulatory standpoint, each medium of

expression creates different circumstances and must therefore be evaluated differently. *See, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). As such, "[T]he First Amendment has a special meaning in the broadcasting context." *FCC v. Pacifica Foundation*, 438 U.S. 726, 741, n. 17 (1978). Thus, whatever the authority of *Edge Broadcasting* may be within the broadcasting context, its holding cannot be applied to the regulatory scheme at issue here, as this scheme is not limited to the broadcast media.

While somewhat different given that this case involves different counties instead of different states, this situation here can best be compared to that in *Bigelow v. Virginia*, 421 U.S. 809 (1975), where the Supreme Court reversed the conviction of a newspaper editor for running an ad for legal abortions services in New York in defiance of a Virginia statute prohibiting advertising within the State of Virginia of any means of procuring an abortion, which was illegal in Virginia at that time. 421 U.S. at 812-813. The Court specifically rejected the idea that Virginia had the ability to prohibit advertising about lawful activity in another state simply because that activity was not lawful in Virginia.[2] *Id.* at 824-825:

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[2] *Bigelow's* 1975 ruling occurred after the United States Supreme Court determined that there exists a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). However, when the newspaper editor in *Bigelow* was

> "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State."

This is no less true for counties than it is for states. Thus, the statues at issue fail to meet the *Central Hudson* test for the purported justification of protecting the interests of individual counties.

V. Conclusion

It is hereby ordered that N.R.S.§ 201.430 and N.R.S. § 201.440 violate the First and Fourteenth Amendments to the United States Constitution, and Article 1, Section 9 of the

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arrested for running the New York abortion advertisement, the State of Virginia had, in fact, banned all abortions and advertising about them. *Roe v. Wade*, and the subsequent amended statute, played no role in the *Bigelow* decision. 421 U.S. at 813, n.3.

Nevada Constitution[3] and are unenforceable, insofar as they relate to legal licensed brothels.

Dated this 1st day of August, 2007.

/s/_____

Hon. James C. Mahan

Respectfully submitted by:

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[3] The rights guaranteed by Article 1 Section 9 of the Nevada Constitution are coextensive with those protected by the First Amendment to the United States Constitution. *University and Community College System of Nevada v. Nevadans for Sound Government*,120 Nev. 712, 722, 100 P.3d 179, 187 (2004).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2007, I deposited for mailing, first class, postage prepaid, at Las Vegas, Nevada a true and correct copy of the foregoing document addressed as follows:

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Plaintiffs-Appellees,

No. 07-16633
D.C. No.
CV-06-00329-
JCM/PAL
OPINION

ROSS MILLER, in his official Capacity as Secretary of State of the State of Nevada; CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada; DAVID ROGER, in his official capacity as District Attorney of Clark County, Nevada,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted
February 13, 2009—San Francisco, California

Filed March 11, 2010

Before: John T. Noonan, Marsha S. Berzon and N. Randy Smith, Circuit Judges.

Opinion by Judge Berzon;
Concurrence by Judge Noonan

COUNSEL

Allen Lichtenstein, Lee Rowland & Margaret A. McLetchie, ACLU of Nevada for the plaintiffs-appellees.

C. Wayne Howle, Esquire, Solicitor General of Nevada for the defendant-appellant.

OPINION

BERZON, Circuit Judge:

> [A]s long as poverty makes virtue hideous and the spare pocket-money of rich bachelordom makes vice dazzling, [the] daily hand-to-hand fight against prostitution with prayer and persuasion, shelters and scanty alms, will be a losing one.
>
> —George Bernard Shaw, *Preface to Mrs. Warren's Profession* viii (1902)

The American experience with prostitution over the last hundred years is testament to the sagacity of Mr. Shaw. Even the coercive machinery of the criminal law, not yet arrayed against the sale of sexual services when Shaw penned *Mrs. Warren's Profession*, has not extinguished the world's oldest profession. The State of Nevada, alone among the states, accommodates this reality by permitting the sale of sexual services in some of its counties.[1] Nevada combines partial legalization of prostitution with stringent licensing and regulation, including health screenings for sex workers, measures to protect sex workers from coercion, and — the aspect of Nevada law here challenged — restrictions on advertising by legal brothels. We must decide whether the advertising restrictions violate the First Amendment.

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[1]From 1980 to 2009, so-called "indoor prostitution" was legal in Rhode Island. Due to a statutory amendment in 1980, prostitution itself was not expressly prohibited, although related activities such as "streetwalking" were. Whether this state of the law was an oversight is not altogether clear. Nevertheless, in 2009 the law was again amended and Rhode Island now outlaws prostitution as does every other state except Nevada. *See* R.I. Gen. Laws § 11-34.1-2 (2009); *see also* Lynn Arditi, *Bill signing finally outlaws indoor prostitution in R.I.*, Projo 7 to 7 News Blog, *available at* http://newsblog.projo.com/2009/11/governor-carcieri-signed-into.html (last visited March 2, 2010).

I.

A.

The sale of sexual services in Nevada is prohibited unless conducted in designated brothels licensed by a county. Nev. Rev. Stat. § 201.354(1). State law prohibits counties of more than 400,000 residents from issuing such licenses, Nev. Rev. Stat. § 244.345(8), and counties with fewer than 400,000 residents are free to prohibit the sale of sexual services by local ordinance. The upshot is that licensed brothels do not operate in Clark County, which includes the city of Las Vegas, or in five of the fifteen remaining counties in Nevada.

State law establishes a strict regulatory regime governing brothels in the eleven counties that choose to license them. Sex workers are subject to mandatory health screening for sexually transmitted diseases, including HIV, Nev. Admin. Code §§ 441A.800-802, and brothel owners are liable for damages resulting from exposure to HIV, Nev. Rev. Stat. § 41.1397. Condom use is mandatory, § 441A.805, and all brothels must so notify customers, § 441A.810.

Several statutory provisions are directed to preventing coercion of sex workers by the operators of brothels and others. Section 201.300 makes criminal "pandering," defined to include, among other acts, inducing, persuading, encouraging, inveigling, or enticing a person to engage in the sale of sexual services. Nev. Rev. Stat. § 201.300; *see also* Nev. Rev. Stat. § 201.360

(prohibiting "placing" a person in a brothel). Detaining a person in a brothel because of debt is also forbidden. Nev. Rev. Stat. § 201.330. Section 201.320 makes it a crime to live from the earnings of a sex worker.[2]

The state's regulatory regime also restricts advertising by legal brothels. The principal restrictions are two: First, brothels are banned from advertising at all in counties where the sale of sexual services is prohibited by local ordinance or state statute. Nev. Rev. Stat. § 201.440.[3]Second, in counties where the sale of sexual services is permitted, brothels cannot advertise "[i]n any public theater, on the public streets of any city or town, or on any public highway." Nev. Rev. Stat. § 201.430(1).[4]

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[2] Enforcement of these laws to protect sex workers appears to be lacking. Alexa Albert's study of one prominent brothel reports that pimps remained common and some assaults against sex workers still occurred, yet the authorities were rarely notified of these criminal violations. *See* Alexa Albert, BROTHEL: MUSTANG RANCH AND ITS WOMEN 71-73, 153-54, 194 (2001).

[3] Nev. Rev. Stat. § 201.440(1) provides:

> In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute, it is unlawful for any person, company, association or corporation knowingly to allow any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise a house of prostitution in his place of business.

[4] Nev. Rev. Stat. § 201.430 provides:

> Unlawful advertising of prostitution; penalties

The statutes further provide that:

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1. It is unlawful for any person engaged in conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030 [prohibiting prostitution solicited on the street], or any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise the unlawful conduct or any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any public highway; or

(b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to NRS 244.345, or conduct which is unlawful pursuant to paragraph (b) of subsection 1 of NRS 207.030, in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

3. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

* * *

> Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

Nev. Rev. Stat. § 201.430(3). Persons in violation of the advertising restrictions are subject to criminal penalties, including fines and imprisonment.

B.

The publishers of two newspapers that circulate in areas of Nevada where prostitution is prohibited and the owner of a legal brothel in Nye County (all referred to, collectively, as Coyote Publishing) bring a facial challenge to Nev. Rev. Stat. §§ 201.430-440, alleging that the advertising restrictions violate the First Amendment of the U.S. Constitution and Article I, Section 9, of the Nevada Constitution.[5]

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[5] Article I, Section 9 of the Nevada Constitution provides, in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Because "Article I, Section 9 affords no greater protection to speech activity than does the First Amendment to the United States Constitu tion[,] . . . under the Nevada Constitution, the appropriate analysis of . . . restrictions [on speech] is identical to that under the First Amendment."

On summary judgment, the district court declared the advertising restrictions unconstitutional. The court first held that in light of section 201.430(3), which defines prima facie evidence of advertising, the restrictions reach beyond pure commercial speech. The district court therefore applied strict scrutiny and determined that the state did not offer any compelling interest in support of its policy. The district court then concluded, alternatively, that even severing 201.430(3) from the rest of the statute, the restrictions still failed the standard of intermediate scrutiny applicable to commercial speech announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Nevada appeals, arguing that (1) intermediate scrutiny (or some lesser level of scrutiny) applies; (2) at least in counties where brothels are prohibited, advertising of brothels does not relate to legal activity and is therefore not protected by the First Amendment; and (3) the substantial state interest in preventing the commodification and commercialization of sex vindicates the advertising restrictions. Taking into account the quite unique characteristics, legal and social, of prostitution, we conclude that Nevada's regulatory scheme is consistent with the

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Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't, 100 P.3d 179, 187 (Nev. 2004) (citations omitted). We therefore address the issues in this appeal under federal constitutional standards.

First Amendment and so reverse the ruling of the district court.

II.

The threshold question is whether the advertising regulations at issue are subject to strict scrutiny or, as Nevada contends, to some lesser scrutiny.

[1] For much of our history the First Amendment was thought not to apply to advertising. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). More than thirty years ago, however, the Supreme Court determined that commercial speech is within the First Amendment's purview, albeit afforded only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Restrictions on commercial speech are now reviewed under the standard of intermediate scrutiny announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-66 (1980).[6]

[2] Speech is "commercial" if it does "no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer*

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[6] Several justices criticized *Central Hudson* in subsequent cases, and the Court as a whole has acknowledged that criticism. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002). Nevertheless, *Central Hudson* remains the governing precedent. *See Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 903-04 (9th Cir. 2009).

Council, Inc., 425 U.S. 748, 762 (1976) (citation omitted). Coyote Publishing contends that Nev. Rev. Stat. § 201.430(3), which provides that "prima facie evidence" of advertising consists of the publication of the address, location, or telephone number of a brothel, or of directions on how to obtain such information, restricts more than pure commercial speech. They suggest that any publication containing information listed in § 201.430(3) — including, for instance, a hypothetical newspaper article covering the brothel industry — would be covered by the statutes.[7]

The Nevada courts have not expressly adopted any limiting construction of section 201.430(3) that cabins its reach to only commercial speech.[8] *Cf. Posadas de Puerto Rico*

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[7] We note that such articles are not merely hypothetical. *See, e.g.*, Steve Friess, *Brothels Asked To Be Taxed, but Official Sees a Catch*, N.Y. TIMES, Jan. 26, 2009, at A11 (featuring a picture of a brothel that reveals its web address and phone number).

[8] *Princess Sea Industries, Inc. v. State*, 635 P.2d 281 (Nev. 1981) suggests such a limitation but does not make it explicit. In that case, the Nevada Supreme Court upheld the statutes at issue here against a First Amendment challenge, treating *Bigelow v. Virginia*, 421 U.S. 809 (1975), and other commercial speech precedents as controlling. *See Princess Sea*, 635 P.2d at 283. A concurring Justice "perceive[d] the advertisement as proposing no more than simply a commercial transaction, markedly different from advertising which contains factual material of clear 'public interest.'" *Id.* at 287 (Manoukian, J., concurring) (citing *Bigelow*, 421 U.S. at 822).

Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 n.7 (1986)

(relying on authoritative statutory constructions that limit the reach of advertising restrictions to purely commercial speech before applying intermediate scrutiny to the speech restrictions). Still, we are not persuaded that section 201.430 burdens any significant quantum of fully protected, noncommercial speech. Importantly, section 201.430(1) prohibits only brothel owners or persons "*acting on behalf of*" a brothel owner from advertising. (Emphasis added.) Thus, on a plain reading of the statute, the publisher of a news account would not be liable.

Moreover, under Nevada law, where a statutory provision makes certain facts "prima facie evidence" of other facts and the presumed facts establish guilt or an element of a criminal offense, a judge may only submit the presumption to the jury if "a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt." Nev. Rev. Stat. § 47.230(2). In other words, only where the evidence, viewed as a whole, would permit a reasonable juror to conclude that the material was "advertising" would the prima facie provision have effect.[9]

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[9] Plainly, therefore, the regulations may not be applied to newspaper articles — or, for that matter, postings on internet message boards — by individuals acting independently of the brothels.

[3] For these reasons and in the context of the present facial challenge, we have no difficulty concluding that

Nevada's advertising restrictions target pure commercial speech. Strict scrutiny, therefore, does not apply.[10]

Nevada argues, conversely, that something *less* than the intermediate scrutiny of *Central Hudson* is applicable. Pointing to *Posadas*, which upheld Puerto Rico's restrictions on casino gambling advertising directed at its residents, 478 U.S. at 344, the state urges that legislatures have greater power to regulate the advertising of so-called "vice" activities, which derives from their power to prohibit the underlying activity all together. "Vice is treated differently," the state contends, and because prostitution is particularly disfavored, the state's power to completely ban the activity includes the ability to ban its promotion, maintains the state.

Posadas certainly provides support for this proposition: "In our view," the Supreme Court

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[10]Coyote Publishing briefly argues that strict scrutiny applies because the advertising restrictions are content-based or because they comprise a total ban on truthful advertising. As to the first argument, "whether or not the . . . regulation is content-based, the *Central Hudson* test still applies because of the reduced protection given to commercial speech." *Metro Lights*, 551 F.3d at 903 n.6. Plaintiff's second argument is subsumed within the *Central Hudson* analysis, which considers at step four whether the restriction is "more extensive than . . . necessary." *Central Hudson*, 447 U.S. at 566.

held, "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46. Indeed, underscoring the applicability of this logic to the present case, *Posadas* endorsed the presumptive validity of the very Nevada statutes at issue here: *Posadas* cited Nevada Revised Statute §§ 201.430 & 201.440 and noted that "[i]t would . . . surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising by those who would profit from such increased demand." 478 U.S. at 346.

Subsequent decisions, however, have cast severe doubt on the rule that restrictions on advertising of vice activity may escape the intermediate scrutiny of *Central Hudson* simply by virtue of the fact that they target vice. *Edge Broadcasting*, a case challenging restrictions on broadcast advertisements for state-run lotteries, did not reach the question, as it upheld the restrictions under the *Central Hudson* test. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993).

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a plurality of the Court considered and rejected the argument that the power to ban a vice activity necessarily includes the power to ban the accompanying commercial speech. *Id.* at 511. The plurality expressly

disavowed *Posadas*, declaring that "it is no answer [to First Amendment challenges] that commercial speech concerns products and services that the government may freely regulate . . . ." *Id.* at 512.

[4] Decisions since *44 Liquormart* have applied intermediate scrutiny to strike down restrictions on the advertising of "vice activities," indicating by necessary implication that a more lenient standard than *Central Hudson* is not applicable. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 195-96 (1999) (gambling); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (tobacco products). As we are constrained to follow *Greater New Orleans Broadcasting* and *Lorillard*, we may not apply a general "vice exception" to the protections accorded to commercial speech.

Nevada also argues for an exception specific to prostitution. We agree that there are strong reasons why the sale of sexual services, in particular, ought to be treated differently than other advertising bans on "vice" activities.

The first derives from the degree of disfavor in which prostitution is held in our society, as reflected in law. In this respect, prostitution is sui generis. Forty-nine of the fifty states today prohibit all sales of sexual services. The federal government acknowledges the link between prostitution and trafficking in women and children, a form of modern day slavery. *See* U.S. Department of State, *The Link Between Prostitution and Sex Trafficking* (November 24,

2004). And federal law prohibits the transportation of persons in interstate or foreign commerce for the purpose of prostitution or other illegal sexual activity. White Slave Traffic Act, 36 Stat. 825, 18 U.S.C. § 2421-2124 (1910). Although Nevada has opted for partial legalization, Nevada too has taken significant steps to limit prostitution, including the total ban on the practice in by far the largest population center,[11] the permission to other counties to ban the practice, and the advertising restrictions here at issue.

The social condemnation of prostitution, therefore, is vastly more widespread — and vastly more consistent — than in the case of other categories of "vice" that courts have considered, such as alcohol, tobacco products, and gambling. This condemnation may be relevant to the degree of scrutiny applicable to these advertising restrictions. The protection of commercial speech is at least in part instrumental, in the sense that courts are concerned about the efficient allocation of the underlying good or service. As the Supreme Court recognized in *Virginia State Board*, 425 U.S. at 765,

> [a]dvertising, however tasteless and excessive it sometimes may seem, is

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[11]Clark County is home to 1,865,746 of the 2,600,167 people in Nevada, or approximately 72 percent of the state's population. U.S. Census Bureau, *Clark County, Nevada Quickfacts*, http://quickfacts.census.gov/qfd/states/32/32003.html (January 21, 2010).

> nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions . . . . To this end, the free flow of commercial information is indispensable.

See also In re R. M. J., 455 U.S. 191, 201 n.11 (1982) ("The commercial speech doctrine is . . . based in part on certain empirical assumptions as to the benefits of advertising."). When the underlying service is of extremely little value, as demonstrated by near consensus within our society, the need for its efficient allocation and distribution is less compelling.

The nature of the market in sexual services, such as it is, provides an additional reason why the goal of efficiency applies with less force. In light of prevailing sexual mores, a highly transparent, and thus efficient, market for sex is a chimera. In this respect, sex is not a commodity.[12] Commercial speech decisions routinely display concern over the risk of distortion of competitive markets. *Greater New Orleans Broadcasting*, 527 U.S. at 189-91, for

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[12] Avoiding the complete commodification of sex is the state interest that Nevada asserts in support of its advertising restrictions. We assess the substantiality of this interest in Part II-A of this opinion.

example, struck down a restriction on advertising of gambling in large part because it favored tribal commercial casinos over non-tribal commercial casinos; *44 Liquormart*, 517 U.S. at 502, invalidated a ban on price advertising of liquor that "like a collusive agreement among competitors . . . [would] tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market"; and *Central Hudson*, 447 U.S. at 570, disapproved a ban on advertising electricity because of the risk that it would stifle innovation in the energy sector. In the context of the *legal* sale of sexual acts, in contrast, there is relatively little market competition to distort.[13]

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[13] We make this observation in part because of the limited extent of the market, but also because of the lack of transparency inherent in commercial sexual transactions. Even in legal brothels in Nevada, for example, prices typically are not agreed upon until *after* a sex worker and client have removed to a private room. *See* Alexa Albert, BROTHEL 19-20.

We are, of course, aware of the existence of a vast illegal market in sexual acts, in Nevada and elsewhere. *See id.* at 171 (describing the abundance of advertisements for "Entertainers" in the Las Vegas Yellow Pages). Commercial speech doctrine, however, is not concerned with the efficient operation of illegal, "black" markets. *See United States v. Williams*, 128 S.Ct. 1830, 1841 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."). In any event, these markets, precisely because they are illegal, are less transparent and efficient than their size would otherwise predict.

Commercial speech doctrine also has been driven in part by objections to paternalistic regulatory policies, which assume that individual consumers need to be protected from their own choices. *See Virginia State Bd.*, 425 U.S. at 770; *44 Liquormart*, 517 U.S. at 503 (plurality opinion). Nevada's advertising restrictions, however, are not based on the premise that consumers of the advertising will act "irrationally" to their own detriment. *See id.* Instead, as developed later, a central premise of the restrictions is that the advertising of prostitution is an integral aspect of, and exacerbates, the commodification of human sexuality on a society-wide basis. Regulations that are addressed to the third-party effects of private transactions, not to protecting people from themselves, are more likely to be consonant with First Amendment values.

[5] Thus, two of the core justifications for protecting commercial speech — facilitating efficient market exchange and shunning paternalism — apply with less force in this context. Nevertheless, we follow the Supreme Court's lead and apply *Central Hudson* where it provides "an adequate basis for decision." *Lorillard*, 533 U.S. at 554-55; *Greater New Orleans Broad.*, 527 U.S. at 184. The distinctive contours of the problem of prostitution outlined above are relevant to the *Central Hudson* analysis. But they do not require that we discard the overall standard altogether rather than incorporating the points of distinction where they

fit when applying that standard, as we shall do later in this opinion.

[6] We therefore apply the familiar four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

Because, as will appear, Nevada's interest in limiting the commodification of sex is important to the analysis at each step, we begin by assessing the substantiality of that interest. We then turn to the remaining steps of *Central Hudson*.

A.

We first consider whether Nevada has asserted substantial state interests in support of its advertising restrictions. Nevada relies largely

on an asserted interest in limiting the commodification of sex.[14]

We are aware of no case that considers the substantiality of a state's interest in preventing commodification — the turning of a good or service into a commodity to be bought and sold — for purposes of constitutional balancing. But the bedrock idea that "[t]here are, in a civilized society, some things that money cannot buy" is deeply rooted in our nation's law and public policy. *See In re Baby M*, 537 A.2d 1227, 1249

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[14] In their submissions, Coyote Publishing characterizes this interest as "not allowing minors to learn of the existence of legal brothels." We do not understand Nevada's argument to be so narrow. Nevada's opening brief explains that the advertising restrictions serve to "limit[ ] prostitution's profile in society." Thus, although Nevada does argue in particular that children should not be exposed to prostitution advertisements, the state's concern over sex commodifying advertisements goes beyond children to encompass society in general.

To the extent that Nevada asserts an interest in protecting minors from age-inappropriate messages, the advertising restrictions may well be overbroad

with respect to such an interest because not sufficiently tailored to avoid infringing on advertising directed to adults. *See Lorillard*, 533 U.S. at 564-65; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). We need not decide whether that is so or not, as we conclude that the restriction is valid without regard to the asserted state interest in protecting children in particular.

(N.J. 1988). The Thirteenth Amendment to the U.S. Constitution enshrines the principle that people may not be bought and sold as commodities. Payment for consent to adoption of a child is widely prohibited. *E.g.*, Cal. Pen. Code § 273; *see also In re Adoption of Paul*, 550 N.Y.S.2d 815, 817-18 (N.Y. Fam. Ct. 1990). In many states, surrogacy contracts are unenforceable, *e.g.*, Mich. Comp. Laws § 722.855 ("A surrogate parentage contract is void and unenforceable as contrary to public policy."), and payment of money in exchange for surrogacy is prohibited, *e.g.*, Ariz. Rev. Stat. § 25-218 (abrogated on other grounds by *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994)); *see generally* Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, nn.128-131 (2009). Federal law forbids the sale of human organs. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339, 42 U.S.C. § 274e (1984).[15]

These public policies may be motivated in part by concerns about the indirect consequences

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[15] We do not mean by recording these somewhat analogous circumstances to suggest that the same considerations that apply to evaluating bans on advertising prostitution would apply with equal force in other contexts. As to surrogacy, for example, there are swiftly evolving public policy approaches in various states, including an extensive, fully legal market. *See* Gestational Surrogacy Act, 750 Ill. Comp. § 47/1514-190.9 (2003); N.H. Rev. Stat. § 168-B:16 (1990). Many of the key considerations we rely on here with regard to prostitution therefore do not apply.

of permitting such sales, but they are also driven by an objection to their inherent commodifying tendencies — to the buying and selling of things and activities integral to a robust conception of personhood. *See Baby M*, 537 A.2d 1227, 1234 (declaring paid surrogacy contracts "potentially degrading to women"); *see also* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1912 (1987) ("[W]e accept an inferior conception of personhood . . . if we suppose people may freely choose to commodify themselves.").

Whether the law *ought* to treat sex as something, like babies and organs, that is "market-inalienable," or instead should treat it as equivalent to the sale of physical labor, is a question much contested among legal academics and philosophers. *Compare* Radin at 1924-25 (advocating a system of incomplete commodification of sexuality in which decriminalization of prostitution is coupled with restrictions on capitalist entrepreneurship and advertising — a system much like Nevada's) *with* Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, *in* RETHINKING COMMODIFICATION 248, 254-58 (Ertman & Williams eds., 2005) (arguing that the idea that the sale of sex is damaging to personhood is culturally contingent and paternalistic). And it may well be that limiting the commodification of human sexuality is in some tension with other ostensible goals of Nevada's scheme, such as protecting women from being forced into prostitution and empowering them to make choices in the course of selling sexual services.

See Martha C. Nussbaum, *Taking Money for Bodily Services*, *in* RETHINKING COMMODIFICATION 243, 246-47 (Ertman & Williams eds., 2005) (arguing that failure to recognize that the sale of sexual services is akin to the sale of any other manual labor is the largest obstacle to improving conditions for sex workers). But these questions are not for us to decide. In most cases that we can imagine — slavery, given the Thirteenth Amendment, being an obvious exception — including this one, it belongs to the political branches to fix the boundary between those human interactions governed by market exchange and those not so governed. In every state but Nevada, that boundary has been drawn so as to forbid such transactions entirely, including the proposing of such transactions through advertising. Nevada has, uniquely for this country, delineated a more nuanced boundary, but still seeks to closely confine the sale of sex acts, geographically, through restrictive licensing where legal, and through the advertising restrictions.[16] We conclude that the interest in preventing the commodification of sex is substantial.

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[16] Nevada's approach of partial legalization and strict regulation does find analogues in several foreign jurisdictions. *See, e.g.*, Prostitution Reform Act 2003, 2003 S.N.Z. No. 28 (N.Z.); Prostitution Act, 1992 (Austl.); Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT'L L. J. 721, 735 (2003) *citing* Law of 6 February 1931, art. 7 (Leb.).

We emphasize that our holding is grounded in two distinctive characteristics of prostitution, each of which is critical to our conclusion:

[7] First, prohibitions on prostitution reflect not a desire to discourage the underlying sexual activity itself but its *sale*. Prostitution without the exchange of money is simply sex, which in most manifestations is not a target of state regulators. *But cf. Lawrence v. Texas*, 539 U.S. 558 (2003). The risk that states will cite the risk of commodification as a fig leaf for hostility to the underlying "product," so to speak — which might be present if an anti-commodification rationale were advanced to justify bans on other types of advertising — is minimal here. More fundamentally, this genuine objection to buying and selling means that in the context of prostitution an advertisement is an integral aspect of the harm to be avoided. In contract terms, an advertisement is an invitation to deal and may operate as an offer, though in the typical case it does not bind the seller. *See* Joseph M. Perillo, I CORBIN ON CONTRACTS § 2.4 (1993). Speech that "does no more than propose a commercial transaction," *see Virginia Bd. of Pharmacy*, 425 U.S. at 762, is particularly susceptible to regulation when the state's objection is to the commercial transaction itself.

[8] Second, public disapproval of prostitution's commodifying tendencies has an impressive historical pedigree. In the minds of early opponents, prostitution was closely bound up with slavery — the paradigmatic case of a

dehumanizing market transaction. *See* Maude E. Miner, *The Slavery of Prostitution: A Plea for Emancipation* ix (1916) (doctoral thesis at Columbia University) ("[Women Offenders'] demoralization of character has constituted moral enslavement."); Amy Dru Stanley, FROM BONDAGE TO CONTRACT 219 & 237 (1998) (citing Massachusetts Bureau of Statistics of Labor, *Third Annual Report* 117 (1872) (lamenting that prostitution implied "the necessity of making merchandise of body and soul")).

The sale of sex was not widely criminalized for much of our nation's history. Prostitution was instead covered only by prohibitions on vagrancy and "streetwalking"; the bans did not extend to brothels or other indoor locations in which sale of sex occurred. *See* Howard B. Woolston, PROSTITUTION IN THE UNITED STATES 25 (1920); Ruth Rosen, THE LOST SISTERHOOD 36 (1982). The legal condemnation of prostitution as such did not arrive until after the Civil War, when a coalition of prominent abolitionists and feminists defeated attempts to license houses of prostitution in several states. David J. Pivar, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900, 52, 55, 67 (1973). William Lloyd Garrison lent his name to anti-licensing efforts, *id.* at 67, which often explicitly invoked slavery and the evils of commodification, *see* Stanley, FROM BONDAGE TO CONTRACT at 257-58 (quoting Elizabeth Blackwell, *The Purchase of Women: The Great Economic Blunder* (1916) (originally published 1886) ("[T]he

slaveholding principle that the human body may be an article of merchandise is still applied to women.")).

The anti-commodification orientation of the early opponents of legalized prostitution was reflected in the nature of the criminal prohibitions adopted early in the twentieth century. Criminal laws were not directed at women themselves but at those profiting from "commercialized forms of vice." *See* Woolston at 32. "Between 1911 and 1915, . . . practically every state in the Union [passed] laws punishing those guilty of forcing girls and women into prostitution, those guilty of pandering, and those living off the earnings of prostitution." *Id.* In 1910, Congress passed the White Slave Traffic Act, underscoring the extent to which policymakers associated prostitution with involuntary servitude and the overriding concern with commercial manifestations of the practice, especially interstate and international trafficking in women. 36 Stat. 825 (1910).

[9] Though attitudes towards the sale of sexual services have continued to change and evolve since the early twentieth century, this history reinforces the conclusion that Nevada's objection is genuinely to the buying and selling of sex. Banning commodification of sex entirely is a substantial policy goal that all states but Nevada have chosen to adopt. Uniquely among the states, Nevada has not structured its laws to pursue this substantial state interest to the exclusion of all others. Rather, it has adopted a nuanced

approach to the sale of sexual services, grounded in part in concern about the negative health and safety impacts of unregulated, illegal prostitution. By permitting *some* legal prostitution, Nevada has been able to subject a portion of the market for paid sex to extensive regulation, while continuing severely to limit the diffusion of sexual commodification through its banning of prostitution where by far most Nevadans live (and where most outsiders visit), Clark County.[17]

[10] Nevada has therefore struck its own idiosyncratic balance between various important but competing state interests. The state's dual approach does not make its asserted interest in limiting commodification of sex any less substantial than in the states that ban commercial sex transactions entirely. Instead, it is the other primary aspects of the *Central Hudson* analysis that may be implicated by Nevada's divided approach — whether the speech regulations "directly and materially" advance the state's interest in limiting commodification of sex,

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[17] We note that although official enforcement of some of the prostitution regulations may be inconsistent, *see supra* note 2, the sociological evidence suggests that the effort to fight sexually transmitted diseases and violence in brothels has been highly successful overall. *See* Alexa E. Albert, David Lee Warner & Robert Hatcher, *Facilitating Condom Use with Clients during Commercial Sex in Nevada's Legal Brothels*, 88 AM. J. PUB. HEALTH 643, 644 (1998); Alexa Albert, BROTHEL at 153; Barbara Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270, 286 (2005).

and whether the regulations are narrowly tailored. *See Greater New Orleans Broad.*, 527 U.S. at 188.

Before addressing those questions, however, we pause briefly to consider whether prostitution is "legal activity" in Nevada, a threshold requirement for speech to receive constitutional protection under *Central Hudson*, concluding that the complexities of Nevada's regulatory scheme make the question a difficult one and one unnecessary to decide in this case.

B.

Central Hudson specifies that if the regulated speech concerns illegal activity or is misleading, the First Amendment extends no protection and the analysis ends. 447 U.S. at 563-64. Nevada does not assert that the advertising of prostitution is false, deceptive, or misleading, so we confine our discussion at this step to the legality of prostitution.

Nevada contends that the advertising at issue is unprotected, at least in those counties where prostitution is prohibited, because prostitution is not legal activity in those counties. Prostitution *is* legal, however, in the counties that house licensed brothels, and it is made legal pursuant to the laws of Nevada, not the laws of some other jurisdiction.

The question whether a state can ban advertising of a transaction legal where it is finally carried out but not where it is proposed through advertising does not arise in the typical

commercial speech case. Often, the two jurisdictions are one and the same. *See, e.g.*, *Lorillard*, 533 U.S. at 533-34 (considering intra-state tobacco advertising and sales). In other instances, the laws of the two jurisdictions do not materially differ. For example, in *Bigelow v. Virginia*, involving a challenge to Virginia's attempt to restrict the advertising of abortion services available in New York, there was "[n]o claim . . . that the advertisement . . . related to a commodity or service that was then illegal in either Virginia or New York." 421 U.S. 809, 828 (1975). In both *Edge Broadcasting* and *Greater New Orleans Broadcasting*, involving challenges to *federal* restrictions on gaming advertisements, individual states had banned the gaming activities at issue, but it was the federal government that was regulating speech, and federal law did not ban the activities. 509 U.S. at 426; 527 U.S. at 180, 183. Here, by contrast, the regulating jurisdiction — the state of Nevada — *has* made prostitution illegal, at least in its major population center.

Moreover, in *Bigelow*, *Edge Broadcasting*, and *Greater New Orleans Broadcasting*, the interests asserted to justify the restrictions had nothing to do with the direct effects of the advertising at the time and place of consumption of those advertisements, *i.e.*, in the jurisdiction where the advertised activity was illegal. Rather, those restrictions were justified in terms of the negative consequences that might flow from residents of one state traveling to another to

obtain a service. *See Bigelow*, 421 U.S. at 824 ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *Edge Broad.*, 509 U.S. at 433-34 (describing the restrictions' purpose as "discouraging [non-lottery state residents'] participation in lotteries"); *Greater New Orleans Broad.*, 527 U.S. at 185 (describing the restrictions' purpose as "reducing the social costs associated with [casino gambling]").[18] It is consistent with fundamental precepts of our federal system that the law of the jurisdiction where the transaction is proposed should govern the legality of those transactions, as citizens of one state ordinarily are free to travel to another state and have their behavior governed by the law of that second state. *See Saenz v. Roe*, 526 U.S. 489, 500-02 (1999).

Nevada's asserted interest in limiting commodification of sex differs in a significant respect from the interests considered in *Bigelow*, *Edge Broadcasting*, and *Greater New Orleans Broadcasting*. An advertisement that proposes

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[18] In *Washington Mercantile Association v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984), we upheld a restriction on the advertising of drug paraphernalia under *Central Hudson*. In the course of that decision, we observed, "[T]he advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity." As in the Supreme Court cases we have discussed, the regulating state in *Washington Mercantile* did not assert any interest in preventing harms inherent in the advertising messages.

the sale of a sexual act does not merely create a risk that a consumer of that message will travel in pursuit of such a transaction. Instead, an advertisement for sex *itself* creates the commodification harm that Nevada seeks to limit. The regulating jurisdiction thus has a different and greater interest, vis-a-vis the jurisdiction where the transaction is proposed, in the context of prostitution than in other commercial speech contexts.

There may, therefore, be some merit to Nevada's novel argument that the legality of prostitution ought to be assessed by reference to the law of the counties in which the advertising occurs, rather than the law of the counties in which the proposed transaction would take place. We need not decide, however, how the illegality concept applies in this case. Even if we agreed with Nevada, the fact remains that Nevada's position on the legality of prostitution in much of the state is essentially agnostic: county governments are free to license or prohibit brothels at their option. *See* Nev. Rev. Stat. § 244.345. We would therefore have to proceed to the remaining steps of the *Central Hudson* analysis in any event. And as we develop in the ensuing discussion, the Nevada advertising restrictions are valid — because narrowly tailored to advance the interest in limiting commodification of sex — even if we assume that the speech in question is accorded commercial speech protection, rather than ousted from any protection under the illegal transaction exception. There is therefore no need to decide whether some

of the advertising is entirely unprotected speech under the *Central Hudson* illegality prong, and we do not do so.

C.

At step three of *Central Hudson*, we ask whether Nevada's commercial speech restrictions "directly and materially advance[ ]" its asserted interest in limiting the commodification of sex. *See Greater New Orleans Broad.*, 527 U.S. at 188.

[11] Increased advertising of commercial sex throughout the state of Nevada would increase the extent to which sex is presented to the public as a commodity for sale. The advertising restrictions advance the interest in limiting this commodification in two closely related ways. First, they eliminate the public's exposure — in some areas entirely, and in others in large part — to advertisements that are in themselves an aspect of the commodifying of sex. As the harm protected against occurs in part from the proposal of the transaction, banning or restricting the advertising directly reduces the harm.

[12] Second, the advertising restrictions directly and materially advance Nevada's interest in limiting commodification by reducing the market demand for, and thus the incidence of, the exchange of sex acts for money, which by definition is commodifying of sex. Nevada *might* be able to reduce the buying and selling of sex acts to a greater degree by instituting a complete ban on prostitution (although there has been no

showing that the actual incidence of acts of prostitution, legal and illegal, in Nevada is greater than it would be under a total ban). But it has chosen to take an approach to reducing demand that will not short-circuit the health and safety gains that come with partial legalization.

Nevada's chosen approach directly and materially advances the state's policy of limiting commodification without undermining its competing health and safety goals. Common sense counsels that advertising tends to stimulate demand for products and services. Conversely, prohibitions on advertising tend to limit demand. *See Edge Broad.*, 509 U.S. at 434 ("[T]he Government may be said to advance its purpose [of reducing demand for lotteries] by substantially reducing lottery advertising . . . ."); *Posadas*, 478 U.S. at 344; *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("It is assuredly a matter of 'common sense' . . . that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait."). Reducing the demand for commercial sex acts in turn limits the commodification of sex.

At the same time, Nevada's decision to legalize prostitution obviously contributes to some extent to the commodification of sex. *See* Michael Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 687 (1994). Yet, as will appear from our

discussion of tailoring, *infra*, this is not a case where the advertising restrictions *themselves* contain exceptions that so "undermine and counteract" the asserted interest that the restrictions fail the tailoring requirement. *See Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009) (quoting *Rubin*, 514 U.S. at 487); *cf. Greater New Orleans Broad.*, 527 U.S. at 194-95. As the cases bearing on tailoring illustrate, incoherence in the operation of speech regulations can be fatal to the constitutionality of a scheme of regulation. In contrast, the fact that banning the underlying activity outright would also promote the interest advanced by restricting advertising does not by itself render a commercial speech regulation unconstitutional. To so hold would be tantamount to requiring that government utilize the least speech restrictive means, which the Supreme Court has made clear is not a sine qua non under *Central Hudson*. *See Greater New Orleans Broad.*, 527 U.S. at 188. Rather, at step three of *Central Hudson*, we need only examine the contribution that the advertising restrictions make to advancing the interest. Here, the restrictions on prostitution advertising directly and materially advance Nevada's interest in limiting the commodification of sex.

Coyote Publishing suggests that Nevada's interest in limiting commodification is not materially advanced by the ban on brothel advertising in the counties where they are not legal because sexually suggestive material is

already widely displayed in Nevada. The argument misses the point. Nevada seeks to limit the message that sex may be bought and sold. It does not object to sex per se, or to messages that utilize sexual innuendo to sell other products. The persistence of those other elements in Nevada society does not defeat Nevada's interest.

To be sure, there are goods and services for sale in the state of Nevada whose advertisement may contribute to the commodification of human sexuality but that escape the advertising ban at issue here — for example, shows featuring nude dancers. But Nevada asserts an interest in limiting the commodification of sexual acts; the buying and selling of nude images is a different concern. Nor is this distinction too fine for purposes of the First Amendment. It is the very distinction that drives the legislative choices of the many states that permit nude dancing but not prostitution.[19]

[13] In sum, we conclude that Nevada's substantial interest in limiting the commodification of sex is directly and materially advanced by the restrictions on brothel advertising.

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[19] *See* Cal. Penal Code § 318.5; N.C. Gen. Stat. Ann. § 14-190.9; Mass. Gen. Laws Ann. ch. 140, § 183A; Federal Heights Mun. Code ch. XII, art. XII, § 12-12-11(B), cited in *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1279 n.5 (10th Cir. 2002) (Colorado).

D.

[14] Finally, we must assess whether the restrictions on advertising are "more extensive than necessary" in light of Nevada's interests. *Central Hudson*, 447 U.S. at 566. "The Government is not required to employ the least restrictive means conceivable," but "it must demonstrate narrow tailoring of the challenged regulation to the asserted interest — a fit that is not necessarily perfect, but reasonable . . . ." *Greater New Orleans Broad.*, 527 U.S. at 188 (internal quotation marks omitted).

[15] Nevada bans brothel advertising completely in counties where prostitution is illegal. In light of the fact that prostitution advertisements are themselves an aspect of the commodification harm that Nevada seeks to limit, we have no trouble concluding that the advertising restrictions are narrowly tailored. Every advertisement for prostitution that is not seen contributes to limiting the commodification of sex, both directly and by reducing demand. Coyote Publishing points to no application of the law that would fail to advance Nevada's interest. *Cf. Lorillard*, 533 U.S. 561-64 (striking down restrictions on tobacco advertising justified only with respect to protecting children because the restrictions infringed substantially on communications that targeted adults, not children).[20]

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[20] We note that for a state that uniformly prohibits both prostitution and prostitution advertising, the tailoring

Nevada's approach in counties where prostitution is legal is less straightforward. In those counties, legal brothels may advertise, but may not do so "[i]n any public theater, on the public streets of any city or town, or on any public highway." Nev. Rev. Stat. § 201.430(1)(a). This aspect of Nevada's scheme requires a more in-depth analysis of tailoring, which has proven the most exacting requirement of *Central Hudson* in recent cases. In *44 Liquormart*, for example, the opinions that made up the Court's fractured disposition agreed that Rhode Island had offered no satisfying reason why its purported goal of increasing liquor prices was better served by advertising restrictions than by "obvious" alternative means. *See* 517 U.S. at 507, 530. And in *Greater New Orleans Broadcasting*, the regulatory scheme failed the tailoring requirement because it arbitrarily discriminated between tribal and non-tribal commercial casinos and fell short of "a rough approximation of efficacy." 527 U.S. at 189-91, 194-95.

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inquiry would end there. There can be no question that a decision by California or Arizona to ban within their borders the advertising of prostitution legal in Nevada would survive this step — and the foregoing steps — of *Central Hudson*, just as there can be no question that the United States would not be prevented by the First Amendment from banning advertising within its borders of child prostitution establishments located in an overseas jurisdiction where such establishments are legal. Where a regulating jurisdiction seeks to limit the commodification of sex, a uniform ban on prostitution advertising is welltailored to that goal.

Nevada's scheme does not suffer from these infirmities. Nevada's choice to pursue its state interests by regulating advertising rather than the alternative means of banning all prostitution directly is a unique one in this country, but not one without a well-developed policy basis: partial legalization and regulation serves Nevada's competing, substantial interests in preventing the spread of sexually transmitted disease and protecting sex workers from abuse. *Cf. 44 Liquormart*, 517 U.S. at 530 ("The ready availability of [alternatives]—at least some of which would far more effectively achieve Rhode Island's *only professed goal*, at comparatively small additional administrative cost—demonstrates that the fit between ends and means is not narrowly tailored.") (O'Connor, J., concurring) (emphasis added). The First Amendment does not require that a regulatory regime singlemindedly pursue one objective to the exclusion of all others to survive the intermediate scrutiny applied to commercial speech regulations.

[16] In permitting some unobtrusive, non-public forms of advertising in counties where brothels are legal, Nevada has achieved "a fit that is not necessarily perfect, but reasonable." *Greater New Orleans Broad.*, 527 U.S. at 188. By keeping brothel advertising out of public places, *see* Nev. Rev. Stat. § 201.430(1)(a), where it would reach residents who do not seek it out, but permitting other forms of advertising likely to reach those already interested in patronizing the brothels, Nevada strikes a balance between its

interest in maintaining economically viable, legal, regulated brothels and its interest in severely limiting the commodification of sex.

[17] Especially in light of the fact that this is a facial challenge, we are unable to strike down these regulations. As we held in rejecting another First Amendment challenge to advertising restrictions, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep to justify invalidating the statute on its face." *Wash. Mercantile*, 733 F.2d at 692 (internal quotation marks omitted). Nevada has tailored its restrictions on advertising to attain a reasonable fit between ends and means.

III.

[18] In sum, we hold that the restrictions on brothel advertising contained in Nevada Revised Statute §§ 201.430-440 are consistent with the First Amendment.

REVERSED.

NOONAN, Circuit Judge, concurring:

I agree with the result of Judge Berzon's thoughtful opinion. I take a different route to reach it.

Nevada states that its advertising restrictions are intended to protect minors. But such a rationale scarcely suffices to justify restrictions on speech intended for adults. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S.

844, 875 (1997) (The "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."). Nevada's other articulation of Nevada's interest in restricting advertising in Nevada by brothels licensed as lawful by Nevada counties is that Nevada seeks "to limit the profile of prostitution" in Nevada. Obviously that limitation is the purpose of the Nevada statutes. But the purpose of the statutes is not the same as the interest that the state is seeking to protect. Nevada, in the presentation of its case to us, has not articulated the state's interest as fully as one might hope.

Neither Judge Berzon nor I takes this failing to be the end of state's case. Judge Berzon finds the state's interest implicit in its other arguments. The state, she says, has an interest in preventing the sale of sexual intercourse by human beings. The state could prohibit such sale entirely. Forty-nine states and six Nevada counties, including the county containing Las Vegas, do. But the state may take a half-step: it may ban the advertising of brothels in counties where they are unlawful, and limit the advertising of brothels where they are permitted.

I agree with the offered rationale, but recognize that to use it we are relying on a kind of state interest not heretofore addressed in the *Central Hudson* line of cases. We recognize that the sexual intercourse of human beings is not like gambling, drinking, or smoking. As Nevada tells us in its brief, it is sui generis. It is an act

performed in private. It is an act not usually engaged in with strangers. It is an act limited by law as to age and blood relationship. It is the way that human life is usually propagated. It is the way that families are usually formed. It is the way in which human love finds its fullest physical expression.

The state of Nevada has proclaimed its interest in this activity by its statutes regulating the creation of marriage, Nev. Rev. Stat. §§ 122.002-122.270; by its statutes governing the dissolution of marriage, *id.* §§ 125.005-125.560; by its statutes specifying the devolution of intestate property, *id.* §§ 134.005-134.210; by its statutes governing the emancipation of minors, *id.* §§ 129.080-129.140; and by its statute shielding spouses from testifying against each other, *id.* § 49.295. The network of laws setting off married couples from unmarried individuals testifies to the central role of sexual intercourse in civil society in Nevada as elsewhere in the United States. Nevada's interest in preventing advertisements for the sale of an activity central to the domestic life of its inhabitants does not need to be spoken by its attorney general. Its interest is stated in its statutes.

No need to go further to defend the Nevada statutes at issue. I strengthen the argument by noting Footnote 20 of Judge Berzon's opinion. It states, there is no question that California or Arizona could constitutionally ban the advertising of the legal Nevada brothels and that the United States similarly could ban the advertisement of

child prostitution that was lawful in a foreign jurisdiction. I agree. But why can such activity lawful in one jurisdiction be kept from being advertised in another jurisdiction? The answer, implicit in Judge Berzon's opinion, is that California, Arizona, or the United States may constitutionally suppress speech that offers sexual intercourse for sale.

FILED
JUL 29 2010
MOLLY C. DWYER,
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U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate;BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Plaintiffs - Appellees,

v.

ROSS MILLER, in his official capacity as Secretary of State of the State of Nevada; CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada; DAVID ROGER, in his official capacity as District Attorney of Clark County, Nevada,

Defendants - Appellants.

No. 07-16633

D.C. No. CV-06-00329-JCM/PAL

District of Nevada, Las Vegas

ORDER

Before: NOONAN, BERZON and N.R. SMITH, Circuit Judges.

The panel has unanimously voted to deny appellee's petition for rehearing en banc. Judge Berzon and Judge Smith have voted to deny the petition, and Judge Noonan has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied. No further petitions for rehearing or rehearing en banc will be entertained.

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(2)

No. 10-564

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

COYOTE PUBLISHING, INC., dba High Desert Advocate; HOWARD COPELAN, Publisher of the High Desert Advocate; BOBBI A. DAVIS, dba the Shady Lady Ranch; DR PARTNERS, dba Las Vegas CityLife, a Nevada General Partnership; STEVE SEBELIUS, Editor of Las Vegas CityLife,

Petitioners,

v.

CATHERINE CORTEZ MASTO, in her official capacity as Attorney General of the State of Nevada,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit was correct when it concluded that speech limitations on brothel advertising in Nevada are measured by the standard test used for commercial speech limitations articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–66 (1980).

2. Whether the Ninth Circuit was correct when it concluded that Nevada's limitations on brothel advertising are constitutional and do not violate the petitioners' First Amendment rights.

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings are all correctly identified in the caption of the case. The petitioners were plaintiffs/appellees below; respondent was the defendant/appellant in the earlier proceedings.

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OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioners have adequately described the opinions below, the jurisdiction of this Court, and the constitutional and statutory provisions involved in this matter.

STATEMENT OF THE CASE

The decision considered here addresses regulation of brothel advertising in the State of Nevada, whose approach to prostitution is unique among the states. In particular this case questions whether Nevada's scheme for regulation of brothel advertising violates the First Amendment.

Prostitution is a crime in every state including Nevada, where it is unlawful in certain of the State's seventeen counties. Nevada has dealt uniquely with the activity by (1) prohibiting prostitution in counties over 400,000, and (2) leaving it to the remaining counties to decide whether to criminalize prostitution or authorize it. Nev. Rev. Stat. 244.345. If authorized, the activity must be permitted and is heavily regulated. Nev. Rev. Stat. 201.295–201.440.

One aspect of regulation is control of brothel advertising. Two statutes accomplish this purpose.

These two statutes—Nev. Rev. Stat. 201.430 and 201.440—are the focus of this case.

The category of speech at issue is ordinarily known as pandering, and is generally punishable as a crime. *See e.g.* Annotation, H. Rockwell, *Constitutionality and Construction of Pandering Acts*, 74 A.L.R. 311 (1931, 2010 supp.) (addressing laws meant to "curb the panderer . . . whose commercialization of prostitution . . . has the tendency to organize and further the practice, and make it more prevalent"). In all states but Nevada, there would be no question about regulation of such activity because it is not lawful communication. Nevada, however, has authorized its rural counties to decide for themselves whether to authorize operation of brothels. If they choose to do so, the counties closely regulate brothel activities for the protection of the public health, safety and welfare. Part of this regulatory scheme is control of brothel advertising, set out in State statutes.

Petitioners depend for their argument on the fact that brothels are—in some Nevada counties—lawful, and urge that brothel advertising deserves the same liberty as any other commercial speech. Nevada and the Ninth Circuit disagree.

Prostitution, legal or not, is not like other commercial activity. As the Ninth Circuit (the Circuit) correctly determined, prostitution implicates profound state interests. When these interests are acknowledged in the analysis of Nevada's limitations on brothel advertising, they logically and necessarily justify those limitations.

The Circuit's decision details the public policy conundrum that prostitution poses for all organized societies. By decriminalizing some limited prostitution, Nevada sets itself apart from the other states. But the broader societal and governmental interests in the context of which this approach has long existed are the same as in all states. *See Coyote Publishing v. Miller*, 598 F.3d 592, 603–04 (9th Cir. 2010) (discussing policies protecting the "conception of personhood"), and *id.* at 611 (concurring opinion of Noonan, J.) (describing the "network of laws setting off married couples from unmarried individuals [indicating] the central role of sexual intercourse in civil society in Nevada as elsewhere in the United States"). These broad interests inform and justify Nevada's direct purpose for limiting brothel advertising. That direct purpose—whether characterized as "preventing the commodification of sex," 598 F.3d at 604, or "suppress[ing] speech that offers sexual intercourse for sale," *id.* at 612 (concurring opinion of Noonan, J.)—is a weighty one the accomplishment of which Nevada has calculated to require the limitations in question. The Circuit's decision properly upholds this product of "normal democratic processes in the laboratories of the States." *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C. J., dissenting), *quoted in District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2326 (2009).

ARGUMENT

No "compelling reasons," Sup. Ct. R. 10, justify a grant of certiorari in this case. Therefore the petition for certiorari should be denied.

1. THE CIRCUIT CONDUCTED THE CONVENTIONAL ANALYSIS TO ARRIVE AT ITS DECISION.

Petitioners' argument that the Circuit's decision reestablishes the vice exception is a straw man, starting with an easily stated but incorrect premise which is then demolished. The entirety of petitioners' first argument, Petition 7–13, is for this reason impertinent. Contrary to petitioners' suggestion, the Circuit decision does not resurrect the vice exception. After a thoroughgoing review of the relevant precedents, the Court expressly concluded: "we may not apply a general 'vice exception' to the protections accorded to commercial speech." 598 F.3d at 600. Rejecting Nevada's invitation to do so, it analyzed the brothel advertising regulations using the standard paradigm established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563–66 (1980).

Nevada had urged the Circuit to consider application of a different, less demanding test. 598 F.3d at 599–602. The Court expressly declined to do so: "The distinctive contours of the problem of prostitution are . . . relevant to the *Central Hudson* analysis. But they do not require that we discard the overall standard altogether rather than incorporating the points of distinction where they fit when applying that standard." *Id.* at 602.

Thus the four part test set out in *Central Hudson Gas* controlled the decision. Though recognizing the *sui generis* nature of the case, the Circuit did not depart from the *Central Hudson* precedent. That precedent, discerningly applied, adequately took account of the uniqueness of prostitution and the State's interest in regulating it, thereby yielding the correct result.

This result does not mean that the Circuit has resurrected the vice exception. Instead, it establishes that the *Central Hudson* factors constitute a discriminating test instead of a bright-line rule or litmus test. Such test is not unique in First Amendment cases. *Cf. Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968) (establishing balancing test for use in public employee free speech cases). If the Circuit's decision here upholds Nevada's brothel advertising statutes after other laws petitioners believe regulate vice advertising have been struck down, it only demonstrates that the *Central Hudson* test is effective at discerning among different cases. In this way, the decision does not commend review but rather serves to validate the *Central Hudson* approach.

2. PETITIONERS RAISE A NOVEL ARGUMENT NOT ARGUED OR DECIDED BELOW.

Petitioners have, without warning, transformed this case into one about political speech. *See* Petition at *i, Questions Presented*, question two.

Problematically this argument was not raised below. Moreover, petitioners fail to explain why brothel advertising is in any sense "political speech"

such as that considered recently in *Citizens United v. Federal Election Com'n,* 130 S.Ct. 876, 898 (2010) (explaining that political speech is "speech uttered during a campaign for political office," *quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)).

Petitioners' various references to "political speech," appearing both in the question presented[1] and at various points in the petition,[2] are conflations of terms: on the one hand, political speech; on the other, the distinct and separate concept of content-based regulation.

The first category of speech is so prized that it "might be maintained that political speech simply cannot be banned or restricted as a categorical matter. . . ." *Citizens United,* 130 S.Ct. at 898. Content-based regulation of commercial speech, on the other hand, is concisely and correctly assessed in the Ninth Circuit's analysis, *see* 598 F.3d at 599, n.10, which concluded that *Central Hudson's* calculus includes consideration of any regulation based upon content.

Nothing in this conclusion is remarkable; this is the well-accepted meaning of *Central Hudson*. *See e.g.*

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[1] Petition at i and 13 ("Whether *Central Hudson* Applies to Restrictions on Disfavored *Political Speech*. . . .") (emphasis added).

[2] See Petition at 15 (referencing "political message that sex is a commodity that can be sold"); 16 (asserting that State's concern is with "political content"); 17 (referencing "political reasons" for regulation); and 18 (invoking the "vigorous protections afforded political speech").

Darrel C. Menthe *Aesthetic Regulation and the Development of First Amendment Jurisprudence*, 19 B.U. Pub. Int. L.J. 225, 252 (2010) ("in the landmark 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established an intermediate scrutiny test for content-based regulation of commercial speech").

The Circuit relied on recent past Ninth Circuit decisions that, in turn, depended on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993), in which the fourth prong of *Central Hudson* was employed just as it was here to consider the necessity for content-based regulation. The *Central Hudson* commercial speech analysis is in fact flexible enough to justify its use, whether or not Nevada's brothel advertising regulations are content-based.

To the extent that petitioners' argument is that brothel advertising is political speech, the argument should be rejected because it was not raised below. To the extent the argument is that the Circuit wrongly determined that *Central Hudson* applies to content-based regulation of commercial speech, it is mistaken.

3. DECISION HAS NO BROAD FUTURE APPLICATION.

This is a case narrowly cabined by the circumstance that no other state has authorized prostitution in any form; neither does any other state entertain the prospect of it. Consequently there is obviously no split in the circuits on the questions presented here, nor will there be in the future.

The Ninth Circuit's decision is also unlikely to spawn new developments in First Amendment law. Although petitioners assert that the decision leaves the possibility of expansion into other areas ("no principled stopping point," Petition at 12) the opposite is true. The Circuit decision articulates this point. Even if prostitution is categorized as trade in human beings or parts, such as are slavery, child adoption, surrogacy and organ sales, 598 F.3d at 603, the Circuit expressly rejected intention to reach these other activities. *Id.* 598 F.3d at 603, n. 15.

CONCLUSION

There are no issues of great moment created by the Ninth Circuit's decision in this matter. The decision determined, unsurprisingly, that limitations on brothel advertising established in Nevada law are consonant with the First Amendment. This result was accomplished by detailed, dutiful application of the Court's precedent governing commercial speech limitations, and it does not contradict or conflict with any other circuit's decision. Nor does it threaten to unreasonably extend the law in significant or unwarranted ways.

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: December 28, 2010